A

LOW KIM CHEONG

v.

SSF CURTAIN SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[PETITION NO: D-26NCC-23-2009]
11 DECEMBER 2009

C ***COMPANY LAW:*** *Members' rights - Petition under Companies Act 1965, s. 181 - Oppression - Minority shareholder - Whether there were grounds to attract provisions of s. 181 Companies Act 1965 - Whether petition unsustainable - Purchase of shares of minority shareholder*

D ***COMPANY LAW:*** *Oppression - Conduct amounting to oppression - Minority shareholder - Whether there were grounds to attract provisions of s. 181 Companies Act 1965 - Whether petition unsustainable - Purchase of shares of minority shareholder*

E F G H In this application by the petitioner, a minority shareholder holding 25% shareholding in SSF Curtain Sdn Bhd ('the company'), pursuant to s. 181 of the Companies Act 1965 ('CA'), the petitioner alleged that: (1) he was instrumental for the development and profitability of the company; (2) that a series of events had taken place which warranted the presentation of the petition; (3) he was systematically edged out of the company and denied any involvement in the management of the company; and (4) the dividends were not paid promptly. The respondents, however, averred that: (a) the petitioner did not come to court with clean hands and did not make a full and frank disclosure of the material facts; (b) the petitioner had accepted at the outset that he was a minority shareholder with no power to make any major decisions; (c) the petitioner was only removed as a general manager and not as a director; (d) there was no oppression as set out in s. 181 of the CA; and (e) the 1st respondent expressly agreed to pay dividends hereinafter based on profits and operation requirements, and following the Articles of Association and the law.

Held (dismissing the petition with costs):

I **(1)** The petition must be dismissed for, *inter alia*, the following reasons: (i) the petitioner was only a minority shareholder and the issue which he had raised in a prolix manner was directed to his participation and management of the company, which *per*

se was not a ground to attract the provisions of s. 181 of the CA; (ii) to attract s. 181 of the CA the oppressive conduct must affect the petitioning member *qua* members and, in this respect, this court agreed with the submission of the respondents; and (iii) the respondents agreed to pay the dividends promptly and according to the law even at the outset of the proceedings, and agreed to purchase the petitioner's shares at the commencement of the proceedings. The petitioner deemed it fit not to consider the proposal and wanted to proceed on the petition which, on the facts of the case, was not sustainable. That did not mean that the petitioner could not accept the terms and/or the respondents could refuse to honour their proposal suggested during the court proceedings and in the affidavits, notwithstanding that the petition was not granted. The respondents' failure to honour their proposal (if any) may be a ground for seeking equitable relief in future proceedings, within the parameters of company jurisprudence, where legal rights are subject to equitable consideration. (para 5)

[Order accordingly.]

Case(s) referred to:

Ban Hin Lee Bank Bhd v. Long Hua Corporation Sdn Bhd & Ors [2000] 6 CLJ 1 HC ***(refd)***

BBMB Kewangan Bhd v. Kueh Teck Swee [2000] 1 LNS 115 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Cheng Siew Hui v. Promax Road Construction Sdn Bhd & Ors [2008] 10 CLJ 86 HC ***(refd)***

Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors [1994] 1 CLJ 157 HC ***(refd)***

Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors [2008] 7 CLJ 315 HC ***(refd)***

Dato' Ting Check Sii v. Galaxy Grip Sdn Bhd & Ors [2007] 1 LNS 432 ***(refd)***

Elder And Others v. Elder & Watson Limited [1952] SC 49 ***(refd)***

Eng Man Hin & Anor v. King's Confectionery Sdn Bhd & Ors [2005] 8 CLJ 77 HC ***(refd)***

Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors [1998] 3 CLJ Supp 126 HC ***(refd)***

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***

Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor [1986] CLJ 417; [1986] CLJ (Rep) 371 HC ***(refd)***

A *Hoy Pak Kwai v. Leong Kon Fah & Ors [2007] 1 CLJ 121 CA* ***(refd)***
In the matter of Tahansan Sdn Bhd [1984] 1 MLJ 204 ***(refd)***
Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors [1993] 1 LNS 32 HC ***(refd)***
Kow Kek Leong v. KL Team Development Sdn Bhd & Ors [1998] 5 CLJ 328 HC ***(refd)***
B *KTS News Sdn Bhd v. See Hua Realty Berhad & Anor [2007] 1 LNS 428* ***(refd)***
Lee Chee Onn v. Lee Keng Soon & Anor [1994] 3 CLJ 461 HC ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
C *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA* ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
PP v. Jowy Manjoro [2004] 1 LNS 724 HC ***(refd)***
D *Re Eng Cheong Peng Kee Pte Ltd; Janie Low v. Low Peng Boon & Ors [1998] 3 SLR 1* ***(refd)***
Re Tiong Eng Sdn Bhd (Loh Loon Keng) [1994] 1 MLJ 451 ***(refd)***
Sakuragawa Pump (S) Pte Ltd v. Perkapalan Mesra Sdn Bhd [2007] 1 LNS 417 ***(refd)***
See Hua Realty Bhd v. See Hua News Holding Sdn Bhd [2007] 7 CLJ 152
E *HC* ***(refd)***
Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors [2004] 6 CLJ 174 HC ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***
F *Ting Teck Sie v. Wong Sen Chiew & Ors [2005] 6 CLJ 495 HC* ***(refd)***
Yap Choo @ Yap Geok Yee v. Syarikat Agent E.N.E. (Jalan Kelang) Sdn Bhd [2009] 1 LNS 574 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181

G *For the petitioner - Lee Wooi Mien (Dicky Lo with her); M/s Kam Woon Wah & Co*
For the respondents - Justin Voon (Rozlan @ Malcolm Murphy & KW Ng with him); M/s Rozlan Khuen

H *Reported by Suresh Nathan*

I

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the petitioner's application pursuant to s. 181 of the Companies Act 1965 (CA 1965). And the prayers read *inter alia* as follows:

> (1) (a) that the 2nd, 3rd, 4th and/or 5th respondents or any of them do purchase the petitioner's 25% shareholding in SSF Curtain Sdn Bhd (Company No. 589679-H) within seven days of the determination of the value of the shares by a professional accountant firm or any other qualified person to be appointed by this Honourable Court and/or an independent qualified person as agreed by the parties;
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> (b) that the 2nd, 3rd, 4th and/or 5th respondents do, within seven days of the order of this court, give a full account and disclosure of the financial transactions by the 1st respondent from 1.2.2009 to the date of this order including uplifting the fixed deposits in CIMB Bank Bhd and Alliance Bank Berhad and in any other banks for distribution of dividends to all the shareholders of the 1st respondent and pending the order herein, all accounts of the 1st respondent is to be frozen;
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> (2) (a) that SSF Curtain Sdn Bhd (Company No: 589679-H) be wound up by the court under the provisions of the Companies Act 1965;
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> (b) that the Official Receiver be and is hereby appointed as the Provisional Liquidator of the company pending outcome of the petition;
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> (c) in the alternative, any other qualified persons be and is hereby appointed as the Liquidator of the 1st respondent.

Brief Facts

[2] The petitioner is a minority shareholder holding 25% and the rest by the relevant respondents. The petitioner alleges that he was instrumental for the development, and profitability of the company. And complains a series of events have taken place which warrants the presentation of the petition. And says the petitioner was systematically edged out of the company and had been barred from entering the premises and denied any involvement or say in the management of the company. Dividends were not paid promptly

despite the retain profits are in millions. The respondents say the petitioner (i) did not come to court with clean hands and did not make a full and frank disclosure of the material facts (ii) he has accepted at the outset that he is a minority shareholder with no power to make any major decisions (iii) he was only removed as a general manager and not as a director (iv) there is no oppression as set out in s. 181(v) the 1st respondent expressly agrees to pay dividend hereinafter based on profits, operation requirements and following the Articles of Association and the law. The petitioner relies on the following cases namely: *Cheng Siew Hui v. Promax Road Construction Sdn Bhd & Ors* [2008] 10 CLJ 86; *Re Eng Cheong Peng Kee Pte Ltd; Janie Low v. Low Peng Boon & Ors* [1998] 3 SLR 1; *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; *Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors* [1998] 3 CLJ Supp 126; *Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors* [1994] 1 CLJ 157; *Ting Teck Sie v. Wong Sen Chiew & Ors* [2005] 6 CLJ 495; *Kow Kek Leong v. KL Team Development Sdn Bhd & Ors* [1998] 5 CLJ 328; *Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors* [2004] 6 CLJ 174; *Lee Chee On v. Lee Keng Soon & Anor* [1994] 3 CLJ 461.

[3] The respondent relies on the following cases namely: *Ban Hin Lee Bank Bhd v. Long Hua Corporation Sdn Bhd & Ors* [2000] 6 CLJ 1; *PP v. Jowy Manjoro* [2004] 1 LNS 724; *Hoy Pak Kwai v. Leong Kon Fah & Ors* [2007] 1 CLJ 121; *Eng Man Hin & Anor v. King's Confectionery Sdn Bhd & Ors* [2005] 8 CLJ 77; *Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor* [1986] CLJ 417; [1986] CLJ (Rep) 371; *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324; *BBMB Kewangan Bhd v. Kueh Teck Swee* [2000] 1 LNS 115; *Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors* [2008] 7 CLJ 315; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; *Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors* [1993] 1 LNS 32; *See Hua Realty Bhd v. See Hua News Holding Sdn Bhd* [2007] 7 CLJ 152; *Re Tiong Eng Sdn Bhd (Loh Loon Keng)* [1994] 1 MLJ 451; *In the matter of Tahansan Sdn Bhd* [1984] 1 MLJ 204; *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24; *Elder And Others v. Elder & Watson Limited* [1952] SC 49; *Yap Choo @ Yap Geok Yee v. Syarikat Agent E.N.E. (Jalan Kelang) Sdn Bhd* [2009] 1 LNS 574; *Popular Industries Ltd v. The Eastern Garment Manufacturing Co. Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577.

Preliminaries

[4] It is trite that the oppressive conduct complained of by the petitioner must relate to the petitioner's interest as a shareholder and not in other capacities such as an employee or a director of the company. I have dealt with this area of jurisprudence in a number of cases namely: (i) *Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors* [2008] 7 CLJ 315 (ii) *Sakuragawa Pump (S) Pte Ltd v. Perkapalan Mesra Sdn Bhd* [2007] 1 LNS 417 (iii) *KTS News Sdn Bhd v. See Hua Realty Berhad & Anor* [2007] 1 LNS 428 (iv) *Dato' Ting Check Sii v Galaxy Grip Sdn Bhd & 4 Ors* [2007] 1 LNS 432. I do not wish to repeat the principles stated therein save to say:

(i) a perusal of the petition will show it is prolix and lacks clarity and does not satisfy the rudimentary requirement of facts necessary to succeed in an application under s. 181 of CA 1965.

(ii) the petitioner has raised disputed issues, and filed a number of affidavits to add to prolixity which by itself is a sufficient ground to dismiss the petition *in limine* save to the issue relating to non-payment of dividends. Even on the assumption the petitioner had made out a case under s. 181 of CA 1965, I take the view that the prayers sought by the petitioner must not be allowed as the respondent has shown interest to purchase the shares on terms. That part of the respondent's submission reads as follows:

> The 2nd Respondent had categorically stated that only in the alternative and where the Court disagree to dismiss the whole of the said Petition, he will be agreeable to purchase 25% of Low's Shareholding provided as follows:
>
> (i) the independent valuation of the said 25% Shareholding *vide* Court appointed valuer is based on the Net Tangible Assets of the 1st Respondent;
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> (ii) the costs of valuation is paid by Low;
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> (iii) Low is ordered by the Court to resign as a Director of the 1st Respondent forthwith;
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> (iv) the 2nd Respondent is allowed time of 36 months from the date of valuation to pay up the purchase price in equal monthly installments as he is only an individual and could not afford to pay up the same in one lump sum due to other financial commitments; and

(v) All other prayers of the Petition should be dismissed with costs.

Taking into consideration that the respondents are prepared to bring an end to the dispute the court, even though not granting the relief as prayed, can give direction etc; when dealing with a petition to ensure that the dispute between shareholder are justly and expeditiously brought to an end. In this case non-payment of dividend may be a good ground for winding up but as the respondents have agreed to pay, direction as to payment of dividend should be sufficient at this stage.

[5] I have read the petition, affidavits and submission of the parties in detail. I take the view the petition must be dismissed. My reasons *inter alia* are as follows:

(i) In the instant case the petitioner is only a minority shareholder and the issue which he has raised in a prolix manner is directed to his participation and management of the company. This *per se* is not a ground to attract the provision of s. 181 of CA 1965.

(ii) To attract s. 181 of CA 1965 the oppressive conduct must affect the petitioning member qua members. In this respect I agree with the submission of the respondents.

(iii) In the instant case the respondent has agreed to pay the dividends promptly and according to law even at the outset of the proceedings and agreed to purchase the shares of the petitioner at the commencement of the proceedings. The petitioner had deemed it fit not to consider the proposal and wanted to proceed on the petition which on the facts of the case is not sustainable. That does not mean that the petitioner cannot accept the terms and/or the respondents can refuse to honour their proposal suggested during court proceedings and in the affidavits notwithstanding the petition is not granted. The failure of the respondents to honour their proposal (if any) may be a ground for seeking equitable relief in future proceedings, within the parameters of company jurisprudence, where legal rights are subject to equitable consideration.

[6] On the facts of the case it is also appropriate to say the court for dismissing the petition had taken cognisance of the fact that the respondents had agreed to purchase the petitioner's shares and the

court expects the respondents to honour the commitment, provided the petitioner accepts the terms within a reasonable time which I will say should not exceed 30 days from the date of this order. If the respondents refuse to honour the terms proposed to this court, within the spirit and intent of the said terms notwithstanding to the condition precedent for the terms (ie, the 2nd respondent had categorically stated that only in the alternative and where the court disagree to dismiss the whole of the said petition, he will be agreeable to purchase 25% of Low's Shareholding provided as follows) then a winding up order or any other equitable orders may be justified. (see *Cheng Siew Hui v. Promax Road Construction Sdn Bhd & Ors, supra*). Notwithstanding the issue of purchase the respondents must pay the dividends to the petitioner from the retained profits within two weeks from the date of this order failing which a winding up order on just and equitable grounds may be appropriate.

[7] For reasons stated above and with the above directions I dismiss the petition with costs. The petitioner to pay the respondents costs in the sum of RM20,000.

I hereby order so.